SURVIVORSHIP DEEDS

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It is a little over 200 years since Isaac Burr and Timothy Phelps executed two deeds which made law for Connecticut. On January 18th, 1726, Burr conveyed an undivided one-half interest in certain lands to Sarah and Hannah Burr, the other half interest being similarly deeded by Phelps, and both deeds being in form sufficient at common law to create a joint tenancy. Sarah died, some 25 years later, devising her interest in the land to Isaac Burr, Jr., through whose insolvent and intestate estate the interest came to Dr. Sylvester Gardner and through him to one Jepson. Hannah Burr, having survived Sarah, sold her interest in the land, by deed of bargain and sale, to one Phelps, on August 24th, 1758. Phelps brought an action of ejectment against Jepson, some years later, his counsel evidently relying on the then newly published discourse of Sir William Blackstone in reaching the conclusion that the entire estate became Hannah's upon the decease of Sarah. The cause came before the Superior Court—then a court whose decisions were of binding authority in Connecticut—at Hartford County in 1769. For reasons not since preserved, that court decided that survivorship, under the common law of Connecticut, was not an incident of joint tenancy, and judgment was rendered accordingly for the defendant.[1]

Writing in 1795, Zephaniah Swift, the Blackstone of Connecticut, evidently relied on this case, at least in part, when he said:

"In England on the death of either of the joint-tenants, his right remains, and goes to the surviving tenants. But in this State we have never adopted this odious and unjust doctrine of survivorship, but on the decease of one of the joint-tenants, his share descends to his heirs." [2]

Thirty-odd years later, with a more mellow experience which included several years as Justice and Chief Justice of the Connecticut Supreme Court of Errors, the same writer, with a bit more tolerance in his attitude, said:

". . . if one [joint tenant] dies, his right does not descend to his heirs, but survives to the other, which is called the *jus accres-*

[1] Phelps v. Jepson, 1 Root 48 (Conn. 1769).

[2] 1 SWIFT, SYSTEM (1795) 272.

cendi, or right of survivorship, which was never recognized in this State." [3]

Wherein Swift found the doctrine of survivorship "odious" and "unjust" is not clear. He contents himself with the statement quoted, without further elaboration. It is probable, however, that he was led into such language by the ease with which, at common law, an estate was construed to be a joint tenancy, contrary, in all likelihood, to the real intent of the grantees of such estates, who in many cases had apparently advanced equal consideration in expectation of receiving equal estates, equally descendible to their own heirs. Thus, in the majority of cases in which the joint tenants were unrelated by blood, marriage, or affinity, an injustice was worked, odious alike to the heirs of the first deceased joint tenant and to the original grantees themselves.

None of the cases give any intimation that public policy would frown on a common-law joint tenancy if created by such means as fully to apprise the tenants of the real incidents and rights involved. Indeed, in one case it was said:

"It is undoubted that a joint tenancy, or tenancy for life, can be created with remainder over to the surviving tenant." [4]

The cases have simply stated the fact that Connecticut law does not recognize the incident of survivorship, and have quoted *Phelps v. Jepson* as their authority. In certain relationships and under proper circumstances, however, the rights and incidents of a common-law joint tenancy appear highly desirable.

The modern attempt to evade the decision in *Phelps v. Jepson* is evinced by the ever-increasing number of the so-called "survivorship deeds" which find their way to the record books in the town clerks' offices in Connecticut, showing that to many persons the doctrine of survivorship is not "odious and unjust." Such a deed, for a consideration received of two persons, passes the estate to the grantees "and the survivor of them, and to such survivor's heirs and assigns," or, in the case of more than two grantees, to the grantees "and the survivors and survivor of them, and to such survivor's heirs and assigns," with similar language in the habendum. In some localities, it is safe to say, the majority of deeds to a husband and wife are made in the survivorship form. There are many such deeds, also, to grantees bearing some close relationship, such as brother and sister. Only infrequently, however, do such deeds appear to grantees who are not so related.

It is a remarkable fact that this form of deed, although now

[3] 1 SWIFT, DIGEST (Dutton's Rev. 1874) side page 102.

[4] Houghton v. Brantingham, 86 Conn. 630, 637, 86 Atl. 664, 667 (1913).

in such very extensive use, and involving as it does such uncertainty in the rights of the parties, has never come before the Connecticut Supreme Court of Errors for interpretation, and very seldom before the courts of last resort in other states.

There is apparently no case in any jurisdiction which fully discusses the rights and liabilities arising out of such a deed, and practicing lawyers—to judge by their acts—have given little thought thereto.

In the only Connecticut case [5] which throws any light on the actual construction of such a deed, land had been conveyed to a husband, on condition that he survive his wife; and in the same deed, the land was conveyed to the wife, on condition that she survive her husband. There was no immediate grant of an unconditional present estate, but the court construed the deed so as to give it what the court conceived to have been the intended effect, and so read into it an estate in the husband and wife for their joint lives, with contingent remainder to the survivor of them. The length to which the court went in fulfilling the intent of the parties is significant; for it is not usual for courts to create an estate, as they there created the life estate, out of a presumed mental condition, unexpressed in the written deed.

In the usual survivorship deed the consideration is stated to be received from both grantees.[6] The chance of any trust resulting to the heirs of the grantee first dying is too remote to merit lengthy discussion. Such a trust would defeat the very purpose of the deed. Added to the difficulty of stating the receipt of the consideration in any other way than from both grantees, so as to conform to and co-extend with the estates granted, there is the obvious fact that such a trust is far removed from the intent of the parties paying for and receiving the deed. Resulting trusts having originated out of the courts presuming the intention of the parties [7] and the intention here being so clearly to the contrary, there is scant argument in favor of any such theory.

The grant is to "John Doe and Richard Roe and to the survivor of them, and to such survivor's heirs and assigns." Our elementary textwriters, our ancient and modern cases, and our classic commentators, all agree on two points: (1) that the word "heirs" is indispensable to the creation at common law of an estate in fee simple in a natural person in his own right,[8] being irreplaceable by such words as "issue" or "in fee simple;" (2)

[5] Bartholomew v. Muzzy, 61 Conn. 387, 23 Atl. 604 (1892).

[6] We shall hereafter treat only of the deeds to two grantees, the principles involved being the same, regardless of the number.

[7] Ward v. Ward, 59 Conn. 188, 22 Atl. 149 (1890).

[8] See Chamberlain v. Thompson, 10 Conn. 243 (1834); Loomis v. Heublein, 91 Conn. 146, 150, 99 Atl. 483, 484 (1916).

that the grant of an estate, without defining its quantity, will convey an estate for the life of the grantee, provided the grantor was capable of conveying such interest.[9]

We apply these rules, in inverse order. The grant is to Doe and Roe, without words of limitation to either, *eo nomine*. Unless we can find something to the contrary in the subsequent language of the deed, the two grantees have each been granted an estate for life.

There is no doubt that the grantor has divested himself of his entire interest, for we find the requisite words of inheritance, applied however to an unnamed, unascertained person—"such survivor." The grantee of the fee simple is not to be determined at once: only when one grantee has died. It is a fee simple granted after a life estate, to a person until then unascertained: a clear case of a contingent remainder, of the first class enumerated by the classic Fearne.

The examination of the wording of the deed has thus given us a joint life estate, with contingent remainder over to the survivor—a conclusion reached by the courts of the few states which have considered the question[10] as well as by Swift."[11] Indeed, a dictum of the Connecticut court is to this effect.[12]

[9] 1 SWIFT, *op. cit. supra* note 3, at side page 83: "The most usual method for creating estates for life, is by lease: but they may be created not only by express words, but by a general grant without specifying any estate, or heirs: this makes him tenant for life; for as no words of inheritance are inserted in the deed, it can not be construed to be a fee: but the estate shall be construed to be as large as the words in the deed will warrant, and therefore if the grantor have authority to make such a grant, it shall be construed to be an estate for the life of the grantee."

[10] Arnold v. Jack's Ex'rs, 24 Pa. 57 (1854), where a devise to three brothers "as joint tenants, and to the survivors and survivor of them, and the heirs of said survivor" was construed to be an estate for their joint lives, with cross-remainder in fee to the survivor. Although survivorship as an incident of joint tenancy was abolished by statute in 1812, it was held that it was still possible to create survivorship by express provisions in a deed or will. A similar result was reached in Mittel v. Karl, 133 Ill. 65, 24 N. E. 553 (1890), where a similar statute was involved, the decision being based on the intent of the parties. *Cf.* also Lewis v. Baldwin, 11 Ohio 352 (1842); Ewing's heirs v. Savary, 6 Ky. 235 (1813); Schulz v. Brohl, 116 Mich. 603, 74 N. W. 1012 (1898); and especially Finch v. Haynes, 144 Mich. 352, 107 N. W. 110 (1906), where our exact conclusion was reached.

[11] "If A. and B. are tenants for their joint lives, remainder to the survivor in fee, here, though during their joint lives a remainder is vested in neither, yet, on the death of either, the remainder instantly vests in the survivor." 1 SWIFT, *op. cit. supra* note 3, at side page 96.

[12] "Where survivorship as an incident to joint tenancy is recognized . . . it is unnecessary to say that the devise is to the two and the survivor of them. Indeed, if a fee is thus given to two and to the survivor of them, it is held that a joint tenancy of freehold for their joint lives is created, with a contingent remainder in fee to the survivor. . . . This gives effect to the words 'to the survivor of them,' which otherwise would be surplusage." Houghton v. Brantingham, *supra* note 4, at 637, 86 Atl. at 667.

But we still are a long way from defining the rights of the grantees.

The chief difficulty has been to decide upon the transferability of such a contingent remainder. This aspect of the deed has received little consideration from lawyers who use it. Recently a lawyer accepted a quitclaim deed from one tenant in survivorship, thinking that he thereby became a tenant in common with the other party; but the Title Company declined to certify to his title, on the ground that the deed had carried only an estate *per auter vie*, the assignability of the remainder being doubtful.

We quote from an early Kentucky case in which a survivorship deed was ably discussed and construed to convey a joint life estate with contingent remainder to the survivor:

"It is evident, under this grant, neither of the grantees, during the life of the other, could by bargain and sale convey more than a moiety of the land for life. It was necessary, therefore, for the plaintiff, in order to shew that the conveyance to him from Vanuxam transferred the entire estate in fee, to prove that Lambert had died prior to the execution of the conveyance." [13]

In Connecticut, a testator once gave to his granddaughter an estate in fee tail, with devise over, upon her death without issue, to his daughter-in-law, the mother of the girl. The mother gave her daughter a quitclaim deed to the property. But the mother, upon the decease of the girl without issue, laid claim to the land. It was held that the mother's interest was a contingent remainder to a person certain on an event uncertain; that the estate was inalienable to a stranger, but could be released to the tenant-in-tail in possession. The court said:

". . . it must be conceded that by the rules of the common law, it [a contingent remainder] cannot be conveyed or transferred, by a deed of bargain and sale, or of feoffment, or other common law assurance, without covenants of warranty, to a stranger to the estate." [14]

Those of us who forget that the Connecticut Supreme Court of Errors, less than a year ago, did not disdain to quote from Kirby [15] will note the date of this case and will make the sweeping, although empirical, statement that this common-law inhibition of the transfer of contingent remainders is a thing of the past: an antiquated doctrine which disappeared into oblivion along with livery of seisin, and the oneness of husband and wife. But let us examine the theory of the survivorship deed, and the later cases in Connecticut and elsewhere.

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[13] Ewing's heirs v. Savary, *supra* note 10, at 238.

[14] Smith v. Pendell, 19 Conn. 106, 112 (1848); see also Bartholomew v. Muzzy, *supra* note 5, at 395, 23 Atl. at 607.

[15] The oldest volume of reported cases in the United States.

Allen v. Almy [16] seems, at first, an authority in favor of such a change in the common law, which has not been altered by statute in Connecticut. There a devise was made in trust for *F* for life, remainder to his children, if any; otherwise to testator's remaining heirs. It was held that the limitation over to the heirs created in them "a vested interest in the sense that it was alienable and transmissible by inheritance. It does not militate against this result that the vesting in enjoyment was postponed to some uncertain and future time, or that such vesting might be entirely defeated by the happening of the event that Mrs. Huntington should die leaving issue." Similar holdings have not been infrequent; [17] but they do not help us, for they concern a remainder to a person certain upon an event uncertain, while we are interested in a remainder to a person uncertain upon an event certain.

In several cases, the assignment by a contingent remainderman has been enforced in equity as an agreement of sale.[18] In other cases, the matter has been altered by statute.[19] One or two cases, with little or no discussion, hold that any contingent remainder is assignable at common law, without depending upon any change or development in the law,[20] but these cases are clearly against the weight of authority, which holds that the quitclaim deed of a contingent remainderman conveys nothing.[21] One case put the matter on the basis of the intent of the parties, construed the deed there considered as intended to pass a fee simple, and so gave effect thereto, though the grantor had only a

[16] 87 Conn. 517, 89 Atl. 205 (1913).

[17] Havens v. Sea Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497 (1890); Robinson v. New York Life Ins. & Trust Co., 75 Misc. 361, 133 N. Y. Supp. 257 (Sup. Ct. 1912); see Dickson v. Dickson, 23 S. C. 216, 225 (1885), where it is said: "Where the existence of the remainderman himself at the time of the event upon which the remainder is to take effect does not constitute the contingency, then the remainder is transmissible;" *cf.* Schapiro v. Howard, 113 Md. 360, 78 Atl. 58 (1910), which held that even then the remainder was assignable only in equity.

[18] Allston v. Bank, 2 Hill Eq. 235 (S. C. 1835); Bayler v. Commonwealth, 40 Pa. 37 (1861); Bailey v. Hoppin, 12 R. I. 560 (1880); Wilcox v. Daniels, 15 R. I. 261, 3 Atl. 204 (1885).

[19] Robeson v. Cochran, 255 Ill. 355, 99 N. E. 649 (1912); Lackland v. Nevins, 3 Mo. App. 335 (1877); McDonald v. Bank, 123 Iowa 413, 98 N. W. 1025 (1904).

[20] Brown v. Fulkerson, 125 Mo. 400, 28 S. W. 632 (1894); Earle v. Maxwell, 86 S. C. 1, 67 S. E. 962 (1910), holding that a contingent remainder was "'property'" which "the bankrupt 'could by any means have transferred'" and so passed to his trustee.

[21] Dart v. Dart, 7 Conn. 250 (1828) (a quitclaim deed held to pass only what the grantor then had); Smith v. Pendell, *supra* note 14; Robeson v. Cochran, *supra* note 19; Read v. Fogg, 60 Me. 479 (1872); Robertson v. Wilson, 38 N. H. 48 (1859) ("A contingent remainder is not an interest that can be conveyed by deed, operating at the time of the conveyance on an existing estate, or that can be taken for debt under legal process");

contingent remainder.[22] The cases agree that the remainder can be conveyed by a warranty deed or other deed operating by way of estoppel,[23] and that it can be released to the particular tenant in possession.[24]

However conclusive these authorities might be in bringing a court to decide a case of first impression in favor of the assignability of contingent remainders, there certainly is not sufficient trend of authority, based on the development of the common law to suit modern conditions, to bring about, in Connecticut, a reversal of the opinion in *Smith v. Pendell.*

But apart from authority, what is the intention of the parties to a survivorship deed? What do they intend to get out of it? And how far have the courts been willing to go to effectuate such intention?

An intimate relationship among the grantees is the almost invariable concomitant of a survivorship deed. A diversified interest is extremely rarely, if ever, to be found. This clearly indicates that the reason for creating such an estate must arise out of some incident of the relationship. The purpose seems to be to make a mutual provision, by pooling of present resources, for the future of both grantees. If the tenancy were one in common between the same individuals, the probability is very strong that each tenant would be the natural object of the other's bounty—potentially the chief beneficiary under any will which the other might make.

Each grantee, therefore, has paid an aliquot portion of the purchase price of the land in order that both might enjoy its use and benefit while both should live; and in order that, upon the decease of one, the other might have full ownership and use without necessity for intervention of the probate court, with its attendant delay and expense. Because of the relationship to that survivor, the first to die has been willing to advance half the price upon the chance that that other, rather than himself, should receive the major benefit.

But has either tenant advanced half the price in order that some third person may gamble on the length of the lives of the co-tenants, and benefit by the decease of one? Will any one claim that a grantee, or creditor, of his co-tenant has entered into his "sorry scheme of things entire" when he advanced such value

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Hall v. Nute, 38 N. H. 422 (1859); Hayes v. Tabor, 41 N. H. 521 (1860); Stewart v. Neely, 139 Pa. 309, 20 Atl. 1002 (1891); see Roundtree v. Roundtree, 26 S. C. 450, 471 (1886).

[22] Hannon v. Christopher, 34 N. J. Eq. 459 (1881).

[23] Read v. Fogg; Robertson v. Wilson; Hayes v. Tabor; Stewart v. Neely, all *supra* note 21.

[24] Smith v. Pendell, *supra* note 14; Bartholomew v. Muzzy, *supra* note 5; Wilson v. Wilson, 32 Barb. 328 (N. Y. 1860); McDonald v. Bank, *supra* note 19.

and took an estate of such precarious duration? In such state of affairs, could either grantee have intended that the other should have a transmissible, attachable interest in the res before the final devolution of the estate upon one or the other owner? Has either grantee contemplated a co-tenancy with any person other than his co-tenant in survivorship? The intent being clear, there remains only the question of how far the courts will go in effectuating it.

The astuteness of the Connecticut court to ascertain and carry out the intent of parties to deeds is illustrated by the early case of *Bryan v. Bradley*,[25] an admirably reasoned opinion. Still more convincing proof is found in the treatment of estates in fee tail, which present the same question of transmissibility. The Connecticut statute transforms estates in fee tail into estates in fee simple in the issue of the first donee,[26] yet the court has consistently held that the issue of the donee in tail had only an estate by limitation, giving them no interest which would be attachable, alienable or transmissible during the life time of the donee in tail,[27] thus leaving the ultimate fee simple in suspense, contrary to the established policy of all courts. The decisions, in a few words, base this rule upon the theory that the words "and to the heirs of his body" are words purely of limitation, rather than of purchase. Yet, if we go further back than these decisions, we find the controlling spirit back of them to be a desire to carry out the intent of the parties. We again quote Swift[28] to demonstrate this, the Connecticut statute mentioned above having been in force at the time he wrote:

"It has ever been a great object to secure a provision for unborn children. . . . But in this State, such an object can be accomplished in a much shorter method [than by "strict settlement," as in England]. As we give to the issue of the first donee in tail, an estate in fee simple, and do not permit the first donee himself to break the entailment by fine or recovery, or any other mode, we enable the owner of an estate, by making use of words proper to create an estate in fee tail, to create an estate of as long duration as can be made in England, or by our law; and which can not be defeated by the tenant in tail. The grant to a man, and the heirs of his body, as effectually secures

[25] 16 Conn. 474 (1844).

[26] CONN. GEN. STAT. (1918) § 5082.

[27] Dart v. Dart, *supra* note 21; Comstock v. Gay, 51 Conn. 45 (1883); St. John v. Dann, 66 Conn. 401, 34 Atl. 110 (1895); *cf.* Davis v. Hayden, 9 Mass. 514 (1813).

[28] Swift has been frequently quoted at the risk of the charge—so ready upon the tongue of modern lawyers—of reliance upon too ancient authority. Yet Swift is still frequently quoted by the Connecticut Supreme Court of Errors and his work is so intimately entwined with Connecticut tradition, setting forth so clearly the common law as developed there that his work is still important and enlightening in any study of the general law of Connecticut. See citation of Swift in Clover v. Urban, 108 Conn. 13, 17, 142 Atl. 389, 390 (1928).

the estate to his unborn children by our law, as it can be done in England, by granting an estate to a man for life, remainder to his unborn children, with trustees to preserve contingent remainders." [29]

In practical effect, a grant to a man and to the heirs of his body, as affected by the Connecticut statute, creates an estate for life with contingent remainder to the heirs of his body. If the courts have not found it subversive of public policy to permit such an isolation of property in this case, upon what ground can we expect a different decision in the case of survivorship tenancy, a joint life estate with contingent remainder over? It is believed that with this additional ground upon which to rely it will be found, when necessary to decide, that a tenant in survivorship cannot convey his interest, except for his own lifetime, by quitclaim deed to a third party, and that *Smith v. Pendell* is still good law.

As to the rights of creditors of the respective co-tenants in Connecticut, there is less need for prediction. In *Smith v. Gilbert*,[30] decided in 1898, a testator gave land to his wife for life, with remainder to two sons; but if either son predeceased the widow, leaving issue, the issue were to take his share. Pending settlement of the estate and during the life of the widow, the plaintiff attached the interest of one son. It was held that the plaintiff secured nothing by his attachment, in either real or personal estate. We quote the headnote of the case:

"Public policy forbids that an interest in property, real or personal, which is so remote, contingent and of uncertain value that it cannot be fairly appraised or sold on execution, should be open to attachment; nor do the statutes of this State authorize the attachment of such an interest."

In the opinion it is said:

"It is the purpose of our law that no estate in land can be taken on execution, unless at its 'true value.'" [31]

Yet how much more susceptible of appraisal was the interest of the son in this case than the interest of a tenant in survivorship, which may prove to be worth less than one month's rent, or to be worth the full value of the land! Certainly public policy in Connecticut has not so altered in a scant thirty years as to prevent this case from controlling the rights of tenants in survivorship, and preserving them from attachment and execution, and, *a fortiori*, from judgment lien.

The carelessness of scriveners forces us to a consideration of a

[29] 1 SWIFT, *op. cit. supra* note 3, at side page 98.
[30] Smith v. Gilbert, 71 Conn. 149, 41 Atl. 284 (1898).
[31] *Ibid.* 155, 41 Atl. 284, 286.

final aspect of our subject. A typical example of the question to be answered is found on page 302 in Volume 116 of the Land Records of the Town of Hamden, Connecticut, where land was deeded to a husband and wife, and the survivor of them; but the habendum clause was to the grantees, their heirs and assigns. What estates were thereby conveyed?

The common law rule was that in case of conflict between the premises and the habendum the premises would control. The reason for this was stated to be that the granting clause was essential to the operation of the deed, the habendum was not; so that the essential clause must necessarily control the superfluous. The Connecticut court has said, "It is in the *premises* of the deed that the thing is really granted." [32]

This rule is very reasonable and satisfactory, provided there is a real conflict, and has often been applied to its full extent.[33] But the courts have later come to realize that what seems at first to be a repugnance is not in fact such, in which case the intention, gathered from the whole deed, is given effect, all in recognizing the rule itself.[34] Thus, where the grant was to *A* and his heirs, habendum to *A* during his lifetime and at his death to be equally divided among his heirs, it was held that the whole deed revealed an intent to give *A* a life use, with remainder over.[35] And a similar effect was given to the habendum in a case where the deed was to *A*, her heirs and assigns; to have and to hold unto *A*, "for and during the natural life, only, of her, the said *A*, with remainder in fee simple to the heirs of the body of the said *A*, her surviving, and, in default of such heirs, then remainder in fee simple to all other heirs of said *A*." [36] In both these cases, the habendum was not repugnant to the premises; it simply explained them, showing what estate was to go to *A* and what estate to *A*'s heirs. Thus, in Missouri, where words of inheritance are not needed in order to create a fee simple, it was held,

[32] Manning v. Smith, 6 Conn. 289, 292 (1826), per Hosmer, C. J.

[33] Dunbar v. Aldrich, 79 Miss. 698, 31 So. 341 (1901); Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 676 (1899); Ratliffe v. Ratliffe, 182 Ky. 230, 206 S. W. 478 (1918); Land v. Land, 172 Ky. 145, 189 S. W. 1 (1916); Smith v. Smith, 71 Mich. 633, 40 N. W. 21 (1888); Adams v. Dunklee, 19 Vt. 382 (1847); Deering v. Long Wharf, 25 Me. 51 (1845); Ratliffe v. Marrs, 87 Ky. 26, 7 S. W. 395 (1888); Winter v. Gorsuch, 51 Md. 180 (1878); Hafner v. Irwin, 20 N. C. 433 (1839); Gaddes v. Pawtucket Institution for Savings, 33 R. I. 177, 80 Atl. 415 (1911).

[34] Combs v. Fields, 211 Ky. 842, 278 S. W. 137 (1925); Powers v. Hibbard, 114 Mich. 533, 72 N. W. 339 (1897); Basset v. Budlong, 77 Mich. 338, 43 N. W. 984 (1889); Wilson v. Terry, 130 Mich. 73, 89 N. W. 566 (1902); Bodine v. Arthur, 91 Ky. 53, 14 S. W. 904 (1890); Baskett v. Sellars, 93 Ky. 2, 19 S. W. 9 (1892); Singleton v. School District, 10 S. W. 793 (Ky. 1889).

[35] Combs v. Fields, *supra* note 34.

[36] Wilson v. Terry, *supra* note 34.

under a grant to *A* with habendum to *A* and his bodily heirs, that a fee tail had been granted, there being no real repugnance.[37]

Occasionally a conflict is resolved upon the ground that clear language cannot be controlled by less clear and decisive words. Thus, a grant to *A*, with request that *X* have it upon *A*'s decease, was held to pass a fee simple to *A*.[38] Again, importance was given to the habendum—in a case where there were previous clauses in conflict with each other—in determining which construction to adopt.[39] Similarly, where the premises were silent as to the estate granted, resort was had to the habendum.[40] In one case, a deed with grant to *A* and the heirs of his body, to have and to hold unto *A*, his heirs and assigns, was held to pass a fee tail upon three grounds: first, because the habendum must yield to the premises in cases of repugnance; second, because words of general limitation must yield to words of special limitation; and third, because the intent gathered from the whole deed must be effectuated.[41]

Any one of the theories set forth in these citations, if applied to our case, would achieve the same result. If the premises are to control, an estate in survivorship has been created. If we take the habendum to be simply an explanation of the premises, we must understand it as explaining the intention of the grantor to divest himself of a fee simple estate which should pass to the grantees and the survivor of them. If we are to take the clear language as controlling, the words in the premises, being in detail of the estate granted, are of superior clarity. There are no previous repugnances to be resolved, and so we need not resort to the habendum for that reason. The premises certainly are not silent as to the estate granted. And if we give predominance to the words of special, rather than general, limitation, we must again take the premises as controlling. As to the intent gathered from the whole deed, we must either construe the deed to create a survivorship, or else treat the double mention of the survivor as surplusage—an unreasonable interpretation. Whichever theory we adopt, the estate is a survivorship tenancy.

The practical cause of the frequency of this question of repugnance between premises and habendum itself gives a reasonable basis for construction. In most of the cases where this error is made, the deed is drawn by filling out a stationer's blank, with the habendum printed in full except for the pronouns preceding the words "heirs and assigns." But the grant-

[37] Utter v. Sidman, 170 Mo. 284, 70 S. W. 702 (1902).

[38] Wolverton v. Hoffman, 104 Va. 605, 52 S. E. 176 (1905).

[39] Green v. Sutton, 50 Mo. 186 (1872).

[40] Havens v. Sea Shore Land Co., *supra* note 17.

[41] Hunter v. Patterson, 142 Mo. 310, 44 S. W. 250 (1898).

ing words must be written out in full, and, for this reason, are most apt to express the true intent of the parties. This aid to construction has been adopted in at least one case, where a deed was made to *A*, during her life, to have and to hold unto *A*, her heirs and assigns. The court recognized the rule of the common law, in case of irreconcilable conflict, and further said:

"The words 'during her life,' as here employed, must be held to mean just what they say, and vest the grantee with an estate during her life only. As the habendum clause is in the regular form generally found in printed deed blanks, the conflict between it and the granting clause may be attributed to the fact that the draftsman of the deed used such a printed blank form in the preparation of the instrument." [42]

In cases where the grant is in survivorship, with habendum to the heirs and assigns of the grantees, the title offices in Connecticut have declined to certify to the title of the surviving tenant, but have, out of their abundant caution, demanded a deed from the representatives of the deceased tenant. This seems unnecessary in view of the authorities. A careful examination of the decisions fails to reveal one upon which the heirs of the deceased tenant could base a reasonable case. The title offices would seem to be entirely safe in certifying to the title of the survivor in such cases, in spite of the fact that as yet there is no decision in Connecticut directly on the point.

[42] Grainger v. Edwards, 190 Ky. 408, 410, 227 S. W. 561 (1921).